SURFACE RIGHTS BOARD

ANNUAL REPORT

April 1, 2011 to March 31, 2012

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Board Profile and Mandate

The Surface Rights Board (SRB or the Board) is a quasi-judicial administrative tribunal established under the *Petroleum and Natural Gas Act* (*PNGA*). The Board has jurisdiction to resolve disputes under the *PNGA*, *Mining Right of Way Act*, *Mineral Tenure Act*, *Geothermal Resources Act*, and *Coal Act*.

In British Columbia, most landowners do not own subsurface rights to petroleum, natural gas, or minerals. The majority of subsurface rights are owned by the Crown. The government can issue rights to resource companies and free miners for the exploration and development of subsurface resources on private property. The resource company or free miner must compensate landowners for loss or damage caused by entering and using their land to access subsurface resources. The Board's role is to assist in resolving disputes when the parties cannot agree on compensation or other terms of entry to land.

When a landowner and a resource company or free miner are unable to reach an agreement on right of entry to the land and the compensation that should be paid to the landowner for that right of entry, either party may apply to the Board for mediation and arbitration of the dispute. The Board may make an order allowing a person or company to enter private land if the Board is satisfied they need the land to explore for, develop, or produce a sub-surface resource. The Board does not have jurisdiction to determine whether a proposed subsurface installation is appropriate or complies with the legislation and regulations.

If damage to land is caused by an entry for the purpose of exploring for, developing or producing a subsurface resource, the landowner may apply to the Board for mediation and arbitration of damages payable by the subsurface holder.

If the parties to a surface lease cannot agree to terms for rent renegotiation after a certain period of time, either party may apply to the Board for arbitration of their dispute.

The Board also has jurisdiction to resolve disputes about whether the terms of a surface lease have been complied with.

An overview of the Board's processes may be found in Appendix 1.

The Board is accountable to the Minister of Energy and Mines but is independent of the Minister and Ministry in its decision making capacity and in the management of applications before it.

The Board has a part-time chair, and may have up to eight additional part-time members.

The following Board members served during fiscal year 2010/11:

Name	Position	Start date	Expiry
Cheryl Vickers	Chair	July 22, 2007	Dec. 31, 2013
Robert Fraser	Vice Chair	July 22, 2007	July 31, 2012
Simmi Sandhu	Member	July 22, 2007	July 31, 2012
William Oppen	Member	Dec. 8, 2008	Dec. 31, 2013
Viggo Pedersen	Member	March 5, 2009	July 31, 2013
Tracey Wolsey	Member	March 5, 2009	July 31, 2011

Biographical information on the Board Members is at Appendix 2.

Dispute Resolution Activities

The Board received 46 applications from April 1, 2011 to March 31, 2012, under the *PNGA*. The Board received one application to amend the terms of an entry order under the *Mineral Tenure Act* (*MTA*). The Board did not receive any new applications under the *MTA, Mining Right of Way Act, Coal Act* or *Geothermal Resources Act*.

Nature of Application	**# received in period**
PNGA (right of entry/compensation for wellsite)	2
PNGA (right of entry/compensation for flowline)	8
PNGA (right of entry/compliance/related activity	2
PNGA (damages)	4
PNGA (rent review)	18
PNGA (compliance)	2
PNGA (termination of surface lease)	3
PNGA (other)	7
MTA	1
Total new applications	**47**
Cases outstanding from previous year	56
Total caseload in period	**103**

This level of activity was lower than last year, when the Board received 72 applications.

When the Board receives an application for right of entry for an oil and gas activity a mediator will determine whether access to land is required for the requested activity, and if so, work with the parties to try and resolve compensation. The Board does not have jurisdiction to determine if a requested activity meets regulatory requirements or to deal with landowner's concerns respecting placement of an installation, environmental impact, or safety – these are matters within the jurisdiction of the Oil and Gas Commission (OGC). The Board will generally require parties to resolve issues within the jurisdiction of the OGC prior to issuing an entry order. The mediator will continue to work with the parties in an effort at resolving compensation issues even after an entry order has been made until the mediator determines a resolution is unlikely. Once the mediator refuses further mediation, the dispute is referred to an arbitrator for adjudication. An application may require several mediations before it is either resolved or referred to arbitration.

The Board similarly mediates applications for damages and rent review in an effort at having the parties resolve the dispute. Once a mediator refuses further mediation, the dispute is referred to an arbitrator for adjudication.

The parties may also negotiate issues without the assistance of a Board mediator in at effort at resolution.

The Table below shows the number of applications completed during the period and open at the end of the period.

Case completions	# before the Board	Completed in period	Open at March 31, 2012
Applications received in 2011/12	47	13	34
Active applications from previous years at April 1, 2011	56	24	32
Total	**103**	**37**	**66**

Of the applications open at March 31, 2012, 52 were at the mediation stage of the process and 8 at the arbitration stage pending an arbitration hearing. Two applications were stayed pending resolution of issues within the jurisdiction of the Oil and Gas Commission. Several applications at the mediation stage were being held contingent upon resolution of other related cases or decisions from the Oil and Gas Appeal Tribunal.

Outstanding cases at year-end	Deficient	Stayed Pending OGC Process	Mediation stage	Arbitration stage	Post Arbitration	Total
PNGA	4	2	52	8	0	**66**

The following Table shows the level of dispute resolution activity in the reporting period compared to the previous four years.

	2011/12	2010/11	2009/10	2008/09	2007/08
Mediations	58	20	8	9	8
Arbitrations	0	4	0	3	1

The following Table shows the resolution method.

	2011/12	2010/11	2009/10	2008/09	2007/08
Applications resolved following Board pre-hearing conferencing or mediation	4	21	4	7	8
Applications withdrawn or settled outside the Board	19	20	3	7	not available
Applications dismissed for lack of jurisdiction	1	0	1	1	2
Applications determined by Arbitration	6	4	1	2	1
Applications determined by summary written process (Change Orders)	7				

The following Table shows the type and number of formal orders and decisions issued by the Board in the reporting period.

Type of Order	Number
Right of Entry Orders	13
Compensation decisions	2
Damages decisions	0
Rent Review decisions	0
Jurisdiction decisions	2
Costs decisions	2
Procedural decisions	2
Reconsideration decisions	2
Amend or Change Orders	23

Six of the right of entry orders were to allow entry to land to construct and operate natural gas wells. Five of these orders were for right of entry to construct and operate flowlines. One entry order related to a water source well and one was to enable compliance with an order of the Oil and Gas Commission. Of the compensation decisions, one was an arbitrated decision relating to the compensation payable for entry and use of land to construct and operate wellsites and flowlines, and one was a consent order relating to compensation for entry and use of land for wellsites.

The Board's decisions may be judicially reviewed under the *Judicial Review Procedure Act* within the time established by the *Administrative Tribunals Act*. No new judicial review applications were filed from Board decisions in the past year. As of March 31, 2012, one judicial review application was outstanding from a compensation decision rendered in 2010.

Decisions of Note

What follows is a synopsis of some of the Board's decisions of note in the reporting period.

Board's jurisdiction – The Board determined it has the jurisdiction to issue an entry order for the purpose of constructing and operating additional wells at a location subject to an existing surface lease. (*Murphy Oil Company Limited v. Jerome, et al.*, Order 1700/17-1, May 24, 2011).

The Board determined it has jurisdiction to issue an entry order for the purpose of operating a water source well. (*Terra Energy Corp. v. Boon, et al.*, Order 1740-2, March 8, 2012).

Compensation – The Board arbitrated the compensation payable for entry to and use of Lands for the purpose of constructing and operating wellsites and flowlines. (*Arc Petroleum Inc. v. Miller, et al.*, Order 1633-3, May 24, 2011).

Costs – The Board considered the newly enacted provisions of the *PNGA* for the payment of advance costs. The Board ordered payment of advance costs to a landowner in an application by a company respecting right of entry and associated compensation. (*Canadian Natural Resources Limited v. Kerr*, Order 1715-2, November 29, 2011). The Board declined to order advance costs in a rent review application. (*Velander v.Imperial Oil Resources Limited*, Order 1726-1, March 30, 2012).

Procedural – The Board made an order for the production of documents to the landowner from the company relevant to an application for review of the annual rent payable under a surface lease. Specifically, the Board ordered the production of any information or documents relating to the testing for contamination of soil, air or water arising from the company's use and occupation of lands for the construction and operation of the wellsite for which entry was authorized under the surface lease that was the subject of the rent review, and information or documents relating to a spill or blowout at the wellsite. (*Merrick, et al v. Encana Corporation*, Order 1697-4, February 22, 2012).

Right of Entry – In a reconsideration decision, the Board determined that the *PNGA* dictates the effective date of a new rental provision and not any agreement between the parties. A party to a surface lease may request a rental review four years after the effective date of each renegotiated rental rate. Any newly ordered or negotiated rental provisions will be retroactive to and effective from the anniversary date of the lease preceding the date that the party made the request for renegotiation. (*Merrick, et al v. Encana Corporation*, Order 1697-3, June 21, 2011).

Other Board Activities

Administration:

The Chair of the SRB, Cheryl Vickers, is also the Chair of the Property Assessment Appeal Board (PAAB). The Ministry of Energy and Mines, the Ministry of Community, Sport and Cultural Development (responsible for PAAB), and PAAB have entered into a Memorandum of Understanding appointing PAAB with the responsibility to oversee the operations and provide day to day administrative services for the SRB. The Board has a Service Agreement with Service BC in Fort St. John and Dawson Creek to provide the public with a local contact point and personal assistance in reviewing applications. The volume of inquiries through Service BC is very low. Most clients communicate directly with the Board through its office in Richmond via email or toll free phone or fax.

Security Deposits:

The Board collected $61,000 in security deposits in the reporting period.

The Ministry of Finance is holding $392,050 in security deposits (some dating back to 1976) that the Board ordered paid prior to entering land. In the reporting period, the Board processed eight applications for the return of security deposits and ordered refunds totaling $77,500.

Filing of Surface Leases:

Section 178 of the *PNGA* requires the holders of surface rights to provide the Board with copies of surface leases and right of way agreements. Compliance with this provision was initially slow, but the Board now frequently receives copies of surface leases and amendment agreements as required. The Board does not know whether all surface leases and amendment agreements are being filed.

The Board is required to make copies of surface leases and right of way agreements available for public inspection at its office. A representative from the Farmers' Advocate office has attended at the Board's office to view leases. Additionally, the Board has provided electronic access to electronic copies of leases for inspection.

The Board continues to work with the Ministry with respect to the enactment of Regulation that will allow publication of surface lease information and the creation of a searchable data base to assist parties before the Board with research on lease payments.

Finances

The Board's budget for 2011/12 was $108,000. As detailed in the table below, the Board was under budget by $35,518.

Expenditure Type	Budget	Actuals	Variance[1]	Notes
Salaries[2]	51,000	20,754	30,246	Reduced salaries as the Vice Chair moved from employee status to a part-time Board member
Benefits	12,000	5,085	6,915	Same variance as salaries
Board Member fees and expenses	21 000	39,746	(18,746)	More Board work undertaken with part-time Board members (versus employees)
Travel	23,000	1,999	21,001	Most travel under Board member expenses
Office overhead[3]		3,876	(3,876)	
Office and business	1,000	1,022	(22)	
Total Expenditures	**108,000**	**72,482**	**35,518**	

Notes:

1. In the variance column (brackets) denote that actual expenditures were over budget.

2. The majority of salaries and benefits were for the Chair who is cross-appointed to the Property Assessment Appeal Board.

3. Overhead charges were billed at 15% of salary and benefits costs as per an MOU between the Property Assessment Appeal Board and the Ministry of Energy and Mines.

Challenges for 2012/13

The Board anticipates that the number of applications will continue at a level similar to the past year or possibly increase.

The Chair will continue to consult with stakeholders, evaluate the effectiveness of the Board's Rules and practices and consider whether changes are necessary.

The Board would like to enhance its website to provide information to assist parties with self-evaluation of applications and to provide more information about Board processes and substantive issues.

The Board is investigating electronic case management options, their cost and functionality, to determine whether adoption of an electronic case management system would be feasible and beneficial.

The Board will continue to work with the Ministry in the development of regulations under the *PNGA*. In particular, the Board would like to see the development of a regulation to prescribe the information from surface leases that the Board may publish pursuant to section 178(4) of the *PNGA*. In the meantime, the Board is maintaining electronic copies of surface leases and amendment agreements and making them available for public inspection in accordance with section 178(3) of the *PNGA*.

The Board will also work with the Ministry in the development of an administrative penalty regulation enabling the Board to impose administrative penalties under section 179 of the *PNGA* for failure to provide the Board with copies of surface leases under section 178 of the *PNGA*. In the meantime, the Board will work with industry and other stakeholders to encourage compliance with section 178 of the *PNGA*.

The Chair will meet with the Commissioner of the OGC to ensure the Memorandum of Understanding on coordinated dispute resolution is working effectively and consider whether changes are required.

Appendix 1

Overview of the Board's Process

Application

An application must be made on the form prescribed by the Board in its Rules. The Board reviews applications to ensure that they are within its jurisdiction and that they are complete and comply with the Board's Rules and relevant legislation. If an application is deficient, the Board will write to the applicant to provide an opportunity to correct any deficiencies within a certain time. The Board may dismiss the application if the deficiencies are not corrected, or if an application is not within the Board's jurisdiction.

Mediation

A mediation is a dispute resolution process that attempts to facilitate resolution of the issues by agreement. A mediations may be conducted in-person or by telephone conference. A mediation is confidential and without prejudice to the positions the parties may take later in any arbitration proceedings.

If the parties have not resolved the issues at the end of the mediation session, the Board Member may schedule another mediation or refuse further mediation. If the mediator determines that access to private land is needed to explore for, develop or produce a subsurface resource, the mediator may issue a right of entry order and order the payment of a security deposit and partial payment for compensation. If the mediator makes an order refusing further mediation, the Board must arbitrate the dispute.

Arbitrations

The Board must arbitrate when the parties cannot reach an agreement. An arbitration is a dispute resolution process where each party presents evidence and arguments and the Board makes a decision based on those submissions.

Before an arbitration hearing, the Board will require the parties to attend a pre-hearing conference, usually conducted by telephone. The Board member will, in consultation with the parties, determine how the application will proceed including determining the issues to be decided, and setting dates for hearing and for the pre-production of evidence and witness lists.

The Board may conduct an arbitration hearing by telephone conference, by written submission, or in-person depending on the nature and complexity of the issues.

In-person hearings are open to the public and may be presided over by a panel of one or more members of the Board. Persons giving evidence at a hearing must swear an oath or affirm that their evidence will be the truth. The panel has control over the conduct of the hearing, including how the evidence is presented, what evidence is admitted, and the issuance of summons for witnesses.

Following the conclusion of the arbitration hearing, the panel will issue a written decision with reasons.

Evidence

The Board may accept any evidence that it considers relevant, necessary and appropriate with the exception of evidence that is inadmissible in court because of a privilege under the law of evidence. The Board will normally set timelines in advance of the hearing for the parties to submit documents or expert reports they intend to rely on at an arbitration.

Withdrawals or Consent Orders

A party may withdraw all or part of an application at any time, by completing a Withdrawal Form and delivering it to the Board and the other parties. If the parties settle the application, they must advise the Board and either withdraw the application or request that the Board incorporate the terms of the settlement into a Consent Order.

Costs

The Board may order a party to pay all or part of the costs of another party and, in exceptional circumstances, may order a party to pay the costs of the Board. Ordinarily, unless otherwise ordered by the Board, landowners may expect to recover their costs of the mediation process relating to applications for right of entry and associated compensation. The Board may order costs on its own initiative or on the application of a party.

Appealing the Board's Decision

Decisions of the Board may be judicially reviewed by the Supreme Court of British Columbia.

Appendix 2

Board Members' Biographical Information

Cheryl Vickers, Chair

Cheryl Vickers is a lawyer and formerly practiced in a variety of fields, including administrative law. Cheryl was appointed as Chair of the Mediation and Arbitration Board in July 2007. She also serves as Chair of the Property Assessment Appeal Board, a position to which she was appointed in January 2003. Cheryl was active in the development of the British Columbia Council of Administrative Tribunals (BCCAT), and served as a member of that organization's Board of Directors including as Secretary from 1996 to 1998 and as President from 2004 to 2006. Cheryl has assisted in curriculum development for BCCAT courses offering training to appointees of quasi-judicial boards and tribunals. She has delivered these courses and workshops on case management and alternate dispute resolution for tribunals.

Robert Fraser, Vice Chair

Active in the real estate industry for many years, Rob Fraser has been a sales person, agent/manager, owner, local board president, provincial association president, and chair of a real estate related insurance company. In addition to his extensive experience and training in real property valuation, Rob also has expertise and training in conflict resolution, mediation, arbitration, and negotiation. He has a BA, an MA and did doctoral studies specializing in micro-demographic models. Rob was appointed as a Vice Chair to the Property Assessment Appeal Board in 1998. He was appointed to the Mediation and Arbitration Board as a member in 2007 and appointed Vice Chair in December 2008.

William Oppen

Bill Oppen is retired and lives in Dawson Creek. Prior to his retirement, Mr. Oppen was the Deputy Minister of Renewable Resources for the Yukon government. He also served as Deputy Minister of Economic Development and has held senior positions with the government of Alberta and the Federal government. He has served on numerous committees including one looking at new work heritage sites for Canada. Bill is a published author and currently is a member of the Board of Directors of the Provincial Capital Commission. He was appointed to the Mediation and Arbitration Board in 2008 as a member.

Viggo Pedersen

Viggo Pedersen was a dairy farmer for 30 years, during which time he represented the dairy farmers to the British Columbia Milk Producers Association and served as the Dairy Director of British Columbia Investment Agriculture.

Active in the community, Mr. Pedersen has been a member of the Chamber of Commerce, and the Rotary Club. He is also a former member of the Peace River Regional District Board of Variance. Currently, Mr. Pedersen is a Director of the Northern Lights College Foundation. He was appointed to the Mediation and Arbitration Board in 2009 as a member.

Simmi K. Sandhu

Simmi Sandhu is a lawyer, called to the BC Bar in 1990. Simmi was appointed as a member of the Mediation and Arbitration Board in 2007 and is also a Vice Chair of the Property Assessment Appeal Board, a position she has held since 2001. As a lawyer, Simmi's areas of practice included administrative law, civil litigation, corporate/commercial law and real estate transactions. She has extensive experience in quasi-judicial proceedings, having acted as a Chair of the Board of Referees and has training and experience in conflict resolution and mediation. Simmi is on the Board of Directors of the British Columbia Council of Administrative Tribunals, currently serving as President.

Tracey Wolsey

Tracey Wolsey lives with her family near Charlie Lake, BC and is a stakeholder relations project manager with Suncor Energy. She has been involved in oil and gas and wind power projects for over ten years. Tracey spends most of her time in Alberta and BC, but has been involved in projects in Saskatchewan, the US and Australia. She has worked as an economic development advisor with the Prophet River Indian Band, and as the coordinator of the Peace River-Liard Community Futures Committee. In 1993 Tracey was elected to a three year term on the Charlie Lake Commission and served as its chair for two years. Over the years she has also served on a wide range of committees involving industry, education and stakeholder issues, most recently sitting as co-chair of the Northeast Energy Mines Advisory Committee. Tracey earned a Bachelor of Arts degree at the University of Calgary and a Masters degree at the University of Northern BC. She was appointed to the Mediation and Arbitration Board in 2009 as a member.